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Supreme Court of the United States

OCTOBER TERM 1968

MASTER TIME COMPANY, LTD., a Virgin Islands Corporation, *Petitioner*, v. THE HONORABLE PERCY DEJONGH, etc., *Respondents*,	No. 1082
and VIRGO CORPORATION, a Virgin Islands Corporation, *Petitioner*, v. RALPH M. PAIEWONSKY, Governor of the Virgin Islands, et al., *Respondents*.	No. 1163

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Opinions Below

The opinion of the Court of Appeals in both cases was consolidated in one opinion and reported at 384 F. 2d 569 (1967). The opinions of the District Court are reported at 5 V.I. 342, 251 F. Supp. 279; 5 V.I. 359, 254 F. Supp. 405, and 5 V.I. 417, 259 F. Supp. 26.

Questions Presented

1. Whether the legislative powers of the Virgin Islands may provide for taxation upon the manufacture of watches though the bulk of such manufactured watches are shipped to the United States.

2. Whether the Government of the Virgin Islands may deny tax exemption to an applicant on the statutory criterion of need.

Statutes Involved

The statutes involved in consideration of the first question raised by the Petitions are as follows:

> Section 36 of the Organic Act of the Virgin Islands —June 22, 1936, Ch. 699, Sec. 36, 49 Stat. 1816 (MT 66a)*
>
> August 28, 1958—Amendment to Revised Organic Act of the Virgin Islands. Public Law 85—851; 72 Stat. 1094 [H.R. 12303]; (M.T. 67a)
>
> Act No. 1518, approved August 30, 1965 (V. I. Sess. L. 1965, p. 470)

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* "MT" refers to the Appendix attached to the Master Time Company Brief; "V" refers to the Appendix attached to the Virgo Corporation Brief.

Act No. 1631, approved March 22, 1966 (V. I. Sess. L. 1966, p. 98)

The statutes involved in consideration of the second question, raised only by the petitioner Virgo Corporation, are contained in 33 V.I.C. sec. 4001 et seq., which pertinent portions are contained in the Appendix to the Petition of Virgo Corporation (V 78a-86a).

Statement

Respondent adopts as its Statement of Facts material to the consideration of the questions here presented the summary of the facts contained in the Opinion of the Court of Appeals.

REASONS FOR DENYING THE WRITS

I. The Court of Appeals has correctly decided that the Legislature has the authority to enact a statute which levies a tax on the manufacture of watches and that such tax is not in violation of the Commerce Clause of the Constitution nor is it a tax upon exports.

The appellants in both cases contend that the Watch Production Quota Tax (imposed by Acts Nos. 1581 and 1631) is either a tax upon exports forbidden by the Constitution and by the Organic Act of the Virgin Islands of 1936 (MT 66a), or in the alternative, in violation of the Commerce Clause of the Constitution.

The fallacy of this reasoning is that both appellants are unwilling to categorize "shipments to the United States" as exports, or in the alternative, as commerce between the States (or between States and Territories

likened to States so as to bring into force the application of the Commerce Clause). These "shipments" must be for purposes of Constitutional inquiry, either

(a) exports; or

(b) commerce between States (or States and Territories likened to States). They must fit into some singular category.

The Government of the Virgin Islands contends that in full accord with precedents established by this Court, shipments from the Virgin Islands to the Continental United States are not exports. With the extension of its legislative authority and power, the Virgin Islands may be considered to have acquired some of the attributes of a state; nevertheless, it remains "an unincorporated territory of the United States" under the Revised Organic Act of 1954, 68 Stat. 497, sec. 2, 48 U.S.C.A., sec. 1541(a). Since it is not a state, it, like Puerto Rico, does not suffer the constitutional impediments applicable to a state. "The constitutional prohibition upon the imposition of duties or imposts on imports [or exports] is inapplicable because that prohibition is laid upon the states, and Puerto Rico, as we frequently have occasion to say, is not a state but an organized territory not incorporated into the United States." *Buscaglia* v. *Ballester,* 162 F. 2d 805, 807 (1st Cir., 1947), cert. den. 332 U.S. 816. Conversely, unlike the Phillippine Islands before it was given in many respects the status of an independent government, the Virgin Islands is not to be regarded as foreign territory. *Cf. Barber* v. *Gonzales,* 347 U.S. 637, 642, 98 L. ed. 1009, 1013 (1954); *Hoover & Allison Co.* v. *Evatt,* 324 U.S.

652, 677, 89 L. ed. 1252, 1270 (1945). "The words 'imports' and 'exports' as therein used [Art. I, Sec. 10, U.S. Const.], have been held to apply only to articles imported from, or exported to, foreign countries." *Patapsco Guano Company* v. *North Carolina Board of Agriculture,* 171 U.S .345, 350, 43 L. ed. 191, 193 (1898). Thus the shipment from the Virgin Islands to the United States is neither an export nor an import under the prohibition on state import and export duties.

Thus it is contended that shipments from the Virgin Islands to the continental United States fall within the realm of *commerce,* not exports. But even in this area, assuming the regulation of such "commerce" by the Virgin Islands Legislature, it is contended that there are no constitutional impediments. The impediments of regulating commerce runs against states or territories which have achieved certain attributes of states, not against "unincorporated territories. . .

No section of the Revised Organic Act of the Virgin Islands, or of any other law of Congress, states that the Constitution is extended to the Virgin Islands, whereas both the Organic Acts of Hawaii (48 U.S.C.A. sec. 495, 47 Stat. 205) and Alaska (48 U.S.C.A. sec. 23; 37 Stat. 512) specifically provided that the Constitution was extended to those states when they were territories. Indeed, it is well settled that except for certain provisions which guarantee or secure certain fundamental personal rights, or which limit the exercise of executive and legislative power when enacted for and over the insular possessions, the Constitution does not follow the flag into unincorporated territories. *Balzac* v. *People*

of Puerto Rico, 258 U.S. 298, 66 L. ed. 627 (1922). The Congress, in the Revised Organic Act of the Virgin Islands included a "Bill of Rights" which covers substantially every one of the guaranties of the Federal Constitution. A similar provision in the Organic Act of Puerto Rico (39 Stat. at L. 951, chap. 145, known as the "Jones Act") was held by the Supreme Court in the *Balzac* case to be a conclusive argument against the contention that the Constitutional guaranties applied *ex propio vigore* to Puerto Rico.

Because the Virgin Islands is not a state but a territory, the legislative power of the Congress, and its authority to delegate that power to the territorial government, is derived from the constitutional grant of plenary control over territories, without restriction by the Commerce Clause. "Since its power . . . as to a territory like Puerto Rico is plenary except as limited by express constitutional restrictions, Congress is not fettered by the commerce clause, Const. Art. I, Sec. 8, Cl. 3, in its power to legislate for Puerto Rico." *Cases* v. *United States,* 131 F. 2d 916, 923 (1st Cir., 1942), cert. den. 319 U.S. 770 (1943), reh. den. 324 U.S. 889 (1945). Similarly, the Congress is not limited by the commerce clause in the extent to which it may delegate its legislative authority:

> "The commerce clause gives Congress plenary power to regulate our foreign and interstate commerce and thus as a necessary consequence it has the secondary effect of a restriction upon the power of the states in the premises. It thus has two aspects, but in neither of them, either as a grant of federal power or as a necessarily consequential

limitation upon state power, does it affect Puerto Rico. In its aspects of a grant of power to the federal government it adds nothing to the comprehensive power given to Congress by the Constitution, Art. IV, section 3, cl. 2, to legislative with respect to national territory, and it can have no consequential effect of limiting territorial action since Congress already has the power under Art. IV, section 3, cl. 2, supra, to limit such action to any extent it chooses, even to the extent of annulling local legislation . . ."

"The actual question presented as we see it is whether Congress, in the exercise of its Constitutional power under Art. IV, section 3, cl. 2, to 'make all needful Rules and Regulations' respecting the Territory of Puerto Rico, has seen fit to give the insular government power to impose the disputed tax." *Buscaglia* v. *Ballester,* supra, 162 F. 2d at 806-807.

Although it has been held "that commerce between the States and a Territory which has become a part of the United States is interstate commerce," *Anderson* v. *Mullaney,* 191 F. 2d 123, 127 (9th Cir., 1951), affirmed at 342 U.S. 415 (1952) (Alaska), *Inter-Island Steam Nav. Co.* v. *Territory of Hawaii,* 96 F. 2d 412, 416-417 (9th Cir., 1938) (Hawaii), the Commerce Clause has been declared not to extend to an unincorporated territory, *Sancho* v. *Barcadi Corporation of America,* 109, F. 2d 57, 62-63 (1st Cir., 1940), reversed on other grounds sub nom. *Barcadi Corporation of America* v. *Domenech,* 311 U.S. 150, 95 L. ed. 98 (1940):

". . . The commerce clause (U.S.C.A. Constitution, Article I, Section 8, clause 3) grants the Congress

> power 'To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes.' By necessary implication, it prevents a state from regulating such commerce. But Puerto Rico is not a state. It is an organized Territory of the United States, though not yet 'incorporated' into the Union, . . . and the indubitable right of the Congress to regulate the Commerce of Puerto Rico is founded on the Constitutional power 'to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States.' (Constitution, Article IV, Section 3, Clause 2). The power is in no direct sense dependent upon the Commerce Clause which as this Court has said 'does not extend to Puerto Rico.' *Lugo* v. *Suazo,* 1 Cir. 59 F. 2d 386, 390. Cf. *Inter-Island Steam Navigation Co. v. Hawaii,* 9 Cir., 96 F. 2d 412.
>
> "The decree of the District Court declaring such legislation unconstitutional cannot be affirmed upon the ground that the Puerto Rican statutes violate the commerce clause of the Constitution of the United States."

Heavy emphasis was placed in the Virgo Petition on *Mullaney* v. *Anderson,* 342 U.S. 415, 96 L. ed. 1328 (1952) and by both Petitions on *Granville-Smith* v. *Granville-Smith,* 349 U.S. 1, 99 L. ed 773 (1955).

Both appellants cite these cases as indications that the Commerce Clause applies to the Territory of the Virgin Islands. A clear reading of the *Mullaney* case indicates a different conclusion. Justice Frankfurter stated in his decision that the only reasons that the Supreme Court determined that the Territory of Alaska

was governed by the Commerce Clause were (1) the Alaskan Organic Act itself which states, "*the Constitution of the United States* and all laws thereof which are not locally inapplicable which have the same force and effect within the Territory as elsewhere in the United States" and (2) further, that Section 9 of the Organic Act of Alaska extended the legislative power of the territory to "all rightful subjects of legislation not inconsistent with the *Constitution* and the laws of the United States." Justice Frankfurter emphasized this by stating "*in the light of these sections* we cannot presume that Congress authorized the territorial legislature to treat citizens of states the way states cannot treat citizens of sister states." p. 420 (emphasis supplied). The District Court of Guam in 1962 noted this distinction in reference to the *Mullaney* case wherein on page 937 of *Ambrose Incorporated* v. *Maddox,* 203 F. Supp. 934 (1962), the Court states "as the Court of Appeals pointed out in the *Mullaney* case, the Congress might confer upon the territory the power to impose burdens upon commerce. This Court cannot hold that it has not done so by its approval implicit in its failure to annul."[1]

By amendment of August 28, 1958 (V 75a), Congress amended subsection (a) of Section 8 of the Revised Organic Act of the Virgin Islands to read as follows:

"(a) The legislative authority and power of the Virgin Islands is extended to all rightful subjects

[1] 48 U. S. C. Sec. 1574 Subparagraph (c) provides that the Legislature shall have power to enact new laws not inconsistent with any law of the United States applicable to the Virgin Islands, subject to the power of Congress to annul any such act of the Legislature.

> of legislation not inconsistent with this act or the laws of the United States made applicable to the Virgin Islands but no law shall be enacted which would impair rights existing or arising by vitrue of any treaty or international agreement entered into by the United States . . ."

Conspicuously absent from this amendment is the reference that appeared in the Organic Act of Alaska that no law shall be enacted in contravention of the Constitution of the United States. This section was enacted after the case of *Granville-Smith* v. *Granville-Smith,* supra, which held that the Legislature of the Virgin Islands is limited to acts of *local application* and extended the power of the Legislature of the Virgin Islands to all *rightful subjects of legislation.* Implicit in this act is the proposition that rightful subjects of legislation are *all* subjects of legislation that a sovereign may exercise subject only to the limitations which are contained in the Organic Act; for example, in the Organic Act of Alaska, where the limitation was that legislation may not be in contravention of the Constitution of the United States. It thus seems clear that Congress in the exercise of its plenary power over the Territory of the Virgin Islands may designate a different requirement than that which it designated for a different territory, especially when Congress reserved the right to annul such legislation when it is not considered in the best interest of the United States.

Furthermore, even if the Commerce Clause, the Export-Import Clause, or the prohibition on new exports as contained in the Organic Act of 1936 could be said to be applicable in general terms to acts of the

Territorial Legislature it would not reach the imposition of production taxes on the manufacture of watches as is here complained, because the taxes are imposed on products which have not reached the stream of commerce. The test of whether the goods have ceased to be a part of the general mass of property in a state subject as such to its jurisdiction by actual entry into the stream of commerce is equally applicable under the Commerce Clause and under the Export-Import Clause. *Empresa Siderugica, S.A.* v. *County of Merced,* 337 U.S. 154, 93 L. ed. 1277 (1949).

Petitioners in both cases rely on *American Oil Company* v. *Neill,* 380 U.S. 451 (1965) for the proposition "that when passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of its tax, that is, substance rather than form." However, what neither petitioner states is what immediately follows that quotation, which is: This approach requires us to determine the ultimate effect of the law as applied and enforced by a state or, in other words, to find *the operating incidence of the tax"* (emphasis supplied). (Ibid) It is to be noted that the facts of the *American Oil Company* case involved whether a state could tax a transaction outside of the state though there exists minimal contacts within the state itself. The Court stated that one of the outstanding prerequisites on state power to tax is the requirement that there must be "some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax." (Ibid) In the Virgin Islands there is more than a minimum connec-

tion. The entire manufacturing process which the territory is taxing occurs within the territorial limits itself and the territory imposes the tax upon the sale or removal of the watches from the factory. Compare *General Motors Corporation* v. *Washington,* 377 U.S. 436, 12 L. ed. 2d 430 (1964). Furthermore, in *General Motors,* supra, the Supreme Court has stated when concerned with state taxing statutes which impinge upon Commerce, "a careful analysis of the cases in this field teaches that the validity of the tax rests upon whether the state is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. For our purposes the decisive issue turns on the operating incidence of a tax. In other words, the question is whether the state has asserted its power in proper proportion to appellant's activities within the state and to appellant's consequent enjoinment of the opportunities and protection which the state has afforded." Id. at 440, 441. In considering the operating incidence of a tax on a purely mechanical basis, this Court has stated that the test of whether goods have ceased to be a part of the general mass of property in a state subject as such to its jurisdiction, by actual entry into the stream of commerce, is equally applicable under the Commerce Clause and under the Export-Import Clause. *Empresa Siderugica, S.A.* v. *County of Merced,* supra. "If the interstate movement has not begun, the mere fact that such a movement is contemplated does not withdraw the property from the state's power to tax it." *Minnesota* v. *Blasius,* 290 U.S. 1, 9, 78 L. ed. 131, 135 (1933).

The Virgin Islands Watch Production Quota Act in its original form and as amended was intended to be a tax on the manufacture of watches and for the collateral purpose of preventing an excess amount of watches from being so manufactured that their likely entry subsequently into the stream of commerce between the United States and the Virgin Islands would lead to a reduction in tariff advantages that the Virgin Islands currently enjoyed and which tariff advantages were a primary force in securing manufacturing endeavors in the Virgin Islands. The mere fact that this tax measure which produced revenue for the Virgin Islands also served as a deterrent to manufacture of watches in excess of a quota, which quota was reasonably believed to be that amount of watches which could safely enter the United States without provoking Congressional action to remove these tariff advantages is neither an abuse of the proper taxing authority of the Legislature of the Virgin Islands nor a matter that the Courts should concern themselves with. As stated by this Court, "It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages or even definitely deters the activities taxed." *United States* v. *Sanchez,* 340 U.S. 44, 95 L. ed. 49 (1950). See also *A. Magnano Company* v. *Hamilton,* 292 U.S. 40, 78 L. ed. 1109 and *United States* v. *Kahriger,* 345 U.S. 22, 97 L. ed. 755 (1953). Though the quota is measured by a percentage of annual consumption of watches in the United States, the quota itself is a fast figure. The measure of a quota, the same as the measure of a tax, is not the taxable event, that is to say, the operating incidence of the tax. *American Manufacturing Company* v. *St. Louis,*

250 U.S. 459, 63 L. ed. 1084. *Alaska* v. *Arctic Maid,* 366 U.S. 199, 6 L. ed. 2d 227 (1961). In *Alaska* v. *Arctic Maid,* supra, a tax was sustained though measured on the value of items which may have entered the stream of commerce. The Court states, "that, however, is the measure of the tax, not the taxable event. The taxable event is prosecuting the business of freezer ships and other floating cold storage. Part of the business is, of course, transporting frozen fish interstate. . ." In the Virgo Petition the appellant cites the cases of *Mandeville Farms* v. *American C.S.,* 334 U.S. 219, 230, 92 L. ed. 1328 (1948) and *United States* v. *Woman Sportswear Association,* 336 U.S. 460, 464 (1949), to the effect that these cases have "outmoded" the concept of interstate commerce, that commerce follows after manufacture and is not a part of it. These citations to this effect do not take into consideration *Empresa Siderugica, S.A.* v. *County of Merced,* supra, where it was stated that actual entry into the stream of commerce is the point at which either the Commerce or the Export-Import Clause applies. Furthermore, *Mandeville,* supra, is not a case concerning limitation of a state's power to tax but instead concerns an extension of the power of Congress to reach beyond traditional concepts of commerce so as to uphold the validity of Congressional action in the area of restraints of trade and monopolies, and the applicability of the Sherman Act. Likewise *United States* v. *Woman's Sportswear Association,* supra, is devoted to the same thesis, not the lack of the power of the states to legislate, but the extension of Congressional legislation in areas now considered to be within the realm of Congressional authority.

In the Master Time Petition it was contended that the cases of *A.G. Spaulding Bros.* v. *Edwards,* 262 U.S. 66; 67 L. ed. 865 (1923) and *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U.S. 69; 91 L. ed. 92 (1946) hold, contrary to the case cited by the Court of Appeals, *Canton Railroad Co.* v. *Rogan,* 340 U.S. 511, 95 L. ed. 488 (1951), that *sale or removal* of goods is a portion of the export process. At the outset it must be remembered that these cases, unlike the instant case, involved a particular set of facts in the *application* of state laws, not the validity of the laws themselves. Here the District Court, on summary judgment in a declaratory proceeding, held that the Watch Production Quota Act, itself was invalid regardless of its application to any individual set of facts by holding that its *purpose* was to tax exports. It is this decision, based upon a void of facts as to the application of the statute, which the Court of Appeals reversed. Furthermore, it was neither the contacts of *sale* or *removal* of goods which this Court found in the *Richfield* or *Spaulding* cases to be contacts at which the operating incidence of the tax in these cases imposed a burden upon exports in contravention to the Constitution, but instead it was the contact of delivery that controlled these decisions. "The fact that *delivery to a common carrier* gave the sale immunity in *A.G. Spaulding and Bros.* v. *Edwards,* 262 U.S. 66, 67 L. ed. 865, 43 S. Ct. 485, supra, is seized upon as stating a rule that the process of exportation has not started until such delivery is made—" *Richfield Oil Corp.* v. *State Board of Equalization,* supra. The contact of "delivery" of oil into the hold of the vessel of a foreign purchaser in *Richfield Oil Corp.* v. *State Board of*

Equalization, supra, was the same contact which the Court in *Spaulding,* supra, seized upon to hold the application of that tax invalid as a tax on exports. The Virgin Islands imposes the Watch Production Quota Act tax on the sale or removal of goods, regardless of future deliveries, thus this is a tax wholly on manufacture, not export, unless some factual application of the tax could in a particular case show it to be a tax on exports. Nothing of this nature was before the District Court when it determined the entire format of the Watch Production Quota tax was illegal merely because that Court perceived an ulterior collateral purpose behind the tax.

II. The Governor was authorized by statute to deny Virgo's application for tax benefits on the ground that Virgo had failed to meet the requirement of need for governmental assistance.

The second question to which this brief applies is contained only in the Petition of Virgo, that is, whether the application of Virgo Corp. for tax benefits was denied improperly by the Government of the Virgin Islands "as part of an overall plan to avoid a conflict with the watch industry on the mainland" (Petition for Writ of Certiorari by Virgo Corporation, p. 19). No further reply need be given to this contention than that contained in the opinion of the Court of Appeals:

"The short answer to this contention is that the Governor stated in writing the reasons for this action, *which adequately supported it* (emphasis supplied) and political considerations were not

among them. We cannot look into the Governor's mental processes nor speculate as to what they were." (V-28a)

The adequate reasons were simply that Virgo did not show that it had met the statutory requirement that it had "need" for the benefits requested; 33 V.I.C. 4001 et seq., nor did Virgo at any point in this action attempt to show that it had such need.

Conclusion

For the reasons stated, both Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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